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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DARREL PATERSON SIMPSON, ROBERT MACRINER ANDERSON, and JAMES ROY FREEMAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSHUA C. NEEDLE
Attorney at Law
1541 Ocean Avenue
Suite 200
Santa Monica, California
Telephone: (213) 393-0520
Counsel for Petitioner
DARREL PATERSON SIMPSON

Publishing and Graphic Electronic Services, Inc. (PAGES) / (213) 474-7855

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QUESTIONS PRESENTED

1. Have the moral and ethical boundaries of Due Process for undercover operations been exceeded by the activities of the Government in this case?

In *United States v. Russell* (1973) 411 U.S. 423, 93 S.Ct. 63, 36 L.Ed.2d 366, (Chief) Justice Rehnquist accurately predicted that "some day" the Court might be presented with a case wherein "the conduct of law enforcement agents is so outrageous that due proces principles would absolutely bar the government from invoking the judicial process to obtain a conviction."

The District Court held that "the conduct here has lowered itself to that level" and dismissed the case. Judge Hatter found that, "Indeed, Mr. Justice Rehnquist's dictum has come home to roost in this case.*** It is important that I send a message now to the government that this kind of activity will not be tolerated."

Upon appeal by the Government, the Ninth Circuit Court of Appeals reversed in a *de novo* review. Finding no precedent for the dismissal on moral or ethical grounds, the Court found that "Although we do not necessarily condone this investigatory tactic, we hold that the government's conduct was not so shocking as to violate the due process clause."

This case, wherein the FBI introduced its informant — a paid, heroin-addicted, professional prostitute — to a suspect, allowed her to develop and maintain an intimate sexual relationship with him, and then involve him in her criminal activities presents this Court with an opportunity to establish the parameters of those "principles of due process" last discussed over a decade ago.

2. Does a dismissal due to "outrageous governmental conduct" establish an "ultimate" exclusionary rule? If so, the Court must provide the lower courts with a new analytical framework for analyzing such claims.

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Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, entered April 3, 1987, rehearing denied June 23, 1987, reversing the decision of the United States District Court, the Honorable Terry J. Hatter, Jr., dismissing these criminal proceedings upon findings that the government agents had violated the Due Process Clause in their pursuit of these individuals.

INTERESTED PARTIES

In addition to the named parties, the following parties appeared in the Court of Appeals as Amicus Curiae:

California Attorneys for Criminal Justice

National Association of Criminal Defense Lawyers

American Civil Liberties Union

OPINION BELOW

On March 1, 1984, Petitioners were indicted with violations of Sections 841(a)(1) and 846 of Title 21, United States Code.

Following pretrial proceedings the Indictment was dismissed by Judge Terry J. Hatter, Jr., District Judge, Central District of California, on June 21, 1984.

A government motion for reconsideration was denied on October 11, 1984.

On October 26, 1984, the Government filed its notice of appeal pursuant to 18 U.S.C. § 3731 and 28 U.S.C. § 1291.

On April 3, 1987, the Ninth Circuit Court of Appeals filed its opinion, affirming in part and reversing in part the District Court; the opinion has been published in the official reports at 813 F.2d 1462, and a true copy is attached hereto as Appendix A. The Court affirmed the order of the District Court suppressing certain wiretaps, but reversed the order dismissing the case upon a finding of outrageous government conduct in violation of the Due Process Clause of the Fifth Amendment of the United States Constitution.

Petitioner seeks review of the reversal of the latter order.

The indictment having been dismissed, Petitioner remains at liberty.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The opinion of the Ninth Circuit was filed on April 3, 1987; Petitioner's petition for rehearing having been denied on June 23, 1987 (see Appendix B), this Petition is timely filed within 60 days thereafter (Rule 20.1/.4, Revised Rules of the United States Supreme Court, as amended July 5, 1984).

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment to the Constitution of the United States

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . ; nor [shall any person] be deprived of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

Following an eight-day evidentiary hearing on motions by the defendants on the dual issues of "Outrageous Government Conduct" under the Fifth Amendment and suppression of wiretaps, the District Court, the Honorable Terry J. Hatter, Jr., Judge, Central District of California, granted both motions. In suppressing the wiretaps — which is not under review herein except insofar as the relevant factual findings support the order dismissing the case — the Court found, *inter alia*, that the affidavit pursuant to 18

U.S.C. § 2518 was "artfully drafted with the intent to mislead the reviewing judge."

In finding the conduct of the government in this case "outrageous" and "shocking to the conscience," Judge Hatter made a lengthy oral statement of his reasoning, including the following comments:

> I am troubled, I am offended, when I see someone like Helen Miller take the stand, a tragic figure. And, indeed, I charge that the Government has made her even more tragic.
>
> ***
>
> Agent Ross, I found to be almost evasive. Perhaps that comes from doing too much undercover work. I don't know.
>
> Agent Hamer, on the other hand, was also engaged in undercover work. I did not find him to be evasive. But I did find, with regard to him, this deliberate closing of the eyes. It cannot be tolerated. . . .
>
> Agent Hamer testified that he was worried from a moral standpoint and from a legal standpoint about how these young ladies would comport themselves, that he didn't want to compromise the case. Well, the case has been compromised.
>
> For the Government to present to this Court Affidavits of the Agent, Miss Miller, where they are almost indignant in their protestations that there was not sexual intercourse, knowing full well that there was, quote unquote, "sexual foreplay," [sic] [is dishonest]

***

> There must be protection of the Constitution and its rights. And as laudable as the result that was sought here, the means were intolerable. . . .
>
> Indeed, Mr. Justice Rehnquist's dictum has come home to roost in this case. There are so many of these kinds of cases in which this motion is made that it is almost laughed away.
>
> ***
>
> But it is important that we as judges continue to listen, as outrageous as sometimes are the defenses that are raised, because there may indeed be the time, as here, where there is some substance to that defense which is raised. As I say, I am constantly in the business of sending messages to drug dealers. It is important I send a message now to the government that this kind of activity will not be tolerated.

Following the denial of their motion for reconsideration, the Government appealed the dismissal and the wiretap suppression order to the United States Court of Appeals for the Ninth Circuit. The suppression order was affirmed, but in what that Court deemed a *de novo* review, the order dismissing the case was reversed.

Relying almost entirely on incomplete *Findings of Fact and Conclusions of Law* rather than on the oral findings as set forth in the Reporter's Transcript, that Court opined that the "three discrete aspects of the FBI's investigations of Simpson" (all of which focused on Ms. Miller's participation) cited by Judge Hatter

were "not so outrageous as to justify dismissal of the indictment on due process grounds." In analyzing this case as one within "that slim category of cases in which the police have been brutal, employing physical or psychological coercion against the defendant," the Court misconstrued the nature of this case entirely:

> We acknowledge that Simpson may have suffered severe emotional trauma and felt stripped of his dignity upon learning that Miller's apparent affection for him was contrived and designed to hasten his downfall. However, because Simpson's treatment by Miller falls short of the brutality and coercion underlying previous successful outrageous conduct challenges and the government cannot be assigned responsibility for his treatment as easily as it could in these successful challenges, we decline to find a due process violation on these unique facts.

In reaching this conclusion the Court rejected any notion that in addition to the due process jurisprudence, Judge Hatter was in any way relying on his discretionary, supervisory powers in dismissing the indictment — which would be reviewed only for an abuse of discretion.

The Court also, in this portion of their decision, misfocused the concept of psychological coercion on whether or not Mr. Simpson willingly began an intimate emotional and sexual relationship with the government's informant rather than on whether or not, given the existence of the government-initiated relationship, it was exploited in a psychologically

coercive manner to induce Mr. Simpson to get involved with drugs — which is the truly relevant question.

Finally, the Court overlooked essential and material facts when it relied on dicta from Judge Hatter to reject Mr. Simpson's argument that the Government "manufactured" the crime underlying this case. At the time they placed Ms. Miller in Mr. Simpson's bed, the government admittedly was relying on nothing more than "suspicions" and that "the first time that she [Miller] reported anything that would show his involvement in narcotics trafficking was mid-September" 1983 — well over a month after her relationship with him had begun.

Petitions for rehearing or rehearing en banc were rejected by the Ninth Circuit on June 23, 1987, and this Petition is being timely filed.

ARGUMENT

I

INTRODUCTION

Due Process inquiries such as those presented in this case inherently reach this Court without factually similar precedents upon which to rely; each such case is inextricably bound to the unique facts of the matter at hand. Our "Principles of Due Process" are not subject to being etched in stone, and governmental behavior that would be acceptable in an emergency situation may well be intolerable in less exigent circumstances. But while "bright lines" may be

unavailable to us, the basic parameters of the concept can and must be established by this Court.

In the dictum that lies at the heart of this litigation, (Chief) Justice Rehnquist summed up this understanding of the Fifth Amendment in one precise sentence: "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking the judicial process to obtain a conviction . . . "

Even the constitutional propriety of a government agent engaging in intimate sexual activities with a targeted criminal suspect is not subject to a *per se* rule of prohibition, and Petitioner does not seek such a ruling. It is not difficult to imagine a situation at the extremes of the philosophical continuum that we know as Due Process where such activities might be not only tolerable, but commendable, such as where a brief sexual liaison could prevent an imminent terrorist attack.

That, however, is not the sort of situation that was facing the FBI in their investigation of Darrel Simpson.

A. FACTUAL HISTORY OF THE SIMPSON "INVESTIGATION"

Sometime in early 1983, FBI Agent Robert Hamer received a telephone call from a Sergent Neville of the Royal Canadian Mounted Police. Sergent Neville wanted to inform the authorities in Los Angeles that an unidentified informant working with the RCMP had named a resident of this city, Darrel Simpson, as an "international heroin trafficker." No details or

documentation were at any time provided or sought to support this multiple hearsay statement, and it is conceded by the government that Mr. Simpson has no criminal record in either the United States or Canada.

Agent Hamer later agreed that the information was more accurately described as a "suspicion" on the part of the Canadians, and that "up until the latter part of September [1983] most of the information that we had gotten was not really enough to warrant indictment, arrest, whatever . . . " On August 23, however, he had placed a unique informant inside Mr. Simpson's life — and his bed.

Since the preceding December Agent Hamer had been working an informant named Helen Miller. Agent Hamer knew that Ms. Miller was a fugitive from Canada, a heroin addict and dealer as well as a professional prostitute. She had been told by Hamer that she was a target in a major investigation, and when he and Agent Robert Ross came to her apartment on the evening of December 22, 1982, she agreed to become an informant. The agents did not, however, tell her that the decision not to prosecute her had already been made.

Throughout her tenure as an informant regarding this matter, Ms. Miller continued her criminal behavior. She was arrested for being under the influence of an opiate, driving while intoxicated and petty theft; on each occasion the FBI arranged for the criminal charges to be dropped. She also admitted in testimony to having continued preying on society as a prostitute during this investigation. Towards the end of the operation against Mr. Simpson Ms. Miller was placed in the Witness Protection Program.

In the Spring of 1983 the FBI first attempted to involve Ms. Miller in the affairs of Mr. Simpson through a person named Shackelton in Canada. Though Miller alleges that Shackelton tried to introduce her to Simpson for purposes of making a drug deal, no such introduction, meeting or deal ever occurred. Shackelton was not called as a witness.

In June of 1983 Agent Hamer compelled production of Mr. Simpson's telephone records from the local phone company. At some point Petitioner Anderson's phone records were also supoenaed. There is no evidence that any of these records revealed any incident or pattern even remotely connected to criminality. Likewise following his travel itineraries had led to no incriminating information.

Agent Hamer agreed that all he had was the "suspicion" of the Canadians that he had adopted as his own: He testified that "Other than information provided by other agencies and other sources, . . . I was unaware of his involvement in drug smuggling activities."

Further, Agent Ross testified that every single "source" contacted by the FBI — state, local and federal agencies alike — all came back "negative" to their inquiries about Mr. Simpson.

In sum, as of August 1983 the government had nothing but the rank multi-level hearsay from unknown persons in Canada upon which to justify their continued investigation of Mr. Simpson. It was upon this factual basis that Agent Hamer decided to introduce Helen Miller to Darrel Simpson.

Agent Hamer knew that Mr. Simpson was going to be arriving at Los Angeles International Airport

during the evening of August 23, 1983 and decided that it would be a good place for an "accidental" meeting to take place. They were accompanied by Karen Eccles, another heroin-user prostitute, who was a friend of Ms. Miller's and who had agreed to cooperate with the FBI in the investigation. According to Ms. Eccles, Hamer instructed them to "get close" to Mr. Simpson because he was a "big dealer." Despite her earlier attempt to get in touch with him, Ms. Miller claimed she did not know why she was supposed to meet Mr. Simpson that evening.

Though the agent claims that both of these ladies had told him that they knew Mr. Simpson from prior contacts in Canada, he showed them a photograph of their target. Nevertheless, he had to direct the women to him after Mr. Simpson had walked right in front of them. Claiming to be stranded, the two women "bumped" into Mr. Simpson and Ms. Miller feigned having known him from a nightclub in Vancouver some twenty years earlier. Mr. Simpson agreed to give them a ride as far as his apartment in West Los Angeles. There they were joined by Tom Marino, a friend of Mr. Simpson.

The next day Ms. Miller called Mr. Simpson and instigated a party for that evening; Ms. Eccles was going to come along, so Mr. Marino was invited to join. That night, while Ms. Eccles and Mr. Marino engaged in sexual relations in one room, Ms. Miller and Mr. Simpson were behaving in an identical fashion in another. There was no evidence that the subject of drugs came up; only sex. With some discrepancies between the testimony of Miller, Eccles and Hamer,

this was discussed between the three of them when they met the next day, August 25, 1983.

Between August 24 and October 1, 1983, Mr. Simpson and Ms. Miller were in constant contact, with approximately 100 telephone calls between their residences. They also went to dinner frequently and socialized on a regular basis. With the knowledge of the FBI, they also frequently spent their nights together.

While this was going on, no drug activities of any sort were reported to the FBI by Ms. Miller. According to Agent Hamer's testimony, "The first time that she reported anything that would show his involvement in narcotics trafficking was mid-September." In fact, the only involvement with drugs on Mr. Simpson's part are those transactions that Ms. Miller set up for the FBI and with the FBI fronting the money, beginning in October of 1983.

Ms. Miller told Mr. Simpson that she loved him, and he believed her; he thought he was in love with her too. When she told him that she was pregnant with his child, nothing could have made this 60-year old man happier. When he finally did reluctantly arrange for a drug transaction, all of the profit — $10,000.00 — went to her, and Agent Hamer allowed her to keep it. Helen Miller was a very well paid prostitute for the FBI.

Days prior to the transaction occurring, Agent Ross, with the help and approval of the Strike Force Attorney assigned to the investigation, prepared his intentionally false and misleading affidavit for the obviously unnecessary wiretap. While much of that document is cause for great judicial concern, two items

are of particular note: 1) Agent Ross had Ms. Miller listed as two separate people, each verifying and corroborating the other, and 2) months after "dropping" Ms. Eccles as an informant because they no longer "trusted" her, she is listed and quoted as a "confidential, reliable informant."

This only summarizes the vast panoply of information that Judge Hatter was relying on when he made his ruling dismissing the case. Additionally, of course, he had his impressions of the witnesses and their credibility, and in this case he found the government's witnesses lacking in morality and honesty, while the key witness for the defense, Ms. Eccles, he found credible and believable.

B. APPLICATION OF DUE PROCESS PRINCIPLES

As noted, etching our "Principles of Due Process" in stone is an impossible task; in this area of constitutional jurisprudence there can be no "bright line" rule. "The difficulty of defining the phrase 'due process of law' has been repeatedly recognized. It has been said that it would be very difficult, if not impossible, to frame a definition of the term which would be accurate, complete, and appropriate under all circumstances, and would embrace every permissible exertion of power affecting private rights and exclude such as are forbidden. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, and thus violative of due process, may, in other circumstances and in the light of other considerations, fall short of such denial." (16A Am Jur 2d § 807, citations omitted) In this case,

however, it seems obvious that the means used in asserting the power of the State were unjustified by the circumstances at hand, far beyond the moral and ethical boundaries of what is proper under our fundamental concepts of fairness and justice.

Every application of due process principles is particular to the factual situation presented. As in this case, the facts underlying the constitutional claim are unique and without precedent. The beauty of the amendment is in its adaptability: While its exact boundaries are undefinable, its content varies according to specific factual contexts. As Justice Frankfurter once said, "It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or essentials of fundamental rights." (*Wolf v. Colorado* (1949) 338 U.S. 25, 27)

Perhaps the most universal formulation of the meaning and parameters of the due process clause appeared in the context of a State's assertion of its jurisdiction in a civil case, *International Shoe Co. v. Washington* (1945) 326 U.S. 310. The state of Washington claimed the power to reach beyond her border to adjudicate the rights of a non-resident corporation. This Court found that such an assertion of governmental power, in that case, was factually justified by the quantity and quality of the contacts that the non-resident had with the state, and thus the assertion of power was not violative of the due process clause, to wit: the *traditional notions of fair play and substantial justice* embodied in Fifth Amendment.

In the criminal law context there is little precedent for applying these principles of due process. In *United States v. Russell* (1973) 411 U.S. 423, (Chief) Justice Rehnquist affirmed that a sufficiently outrageous exercise of power by the government in investigating and/or generating criminal conduct in violation of those principles "would absolutely bar the government from invoking the judicial process to obtain a conviction." This was confirmed by the Court in *Hampton v. United States* (1976) 425 U.S. 484: A criminal indictment should be dismissed when the conduct of government agents has reached a "demonstrable level of outrageousness." Judge Hatter, of course, specifically found that such an intolerable level of behavior had been reached and amply demonstrated in this case. The Court of Appeals did not dispute the outrageousness of the behavior, they simply found no precedent for such a dismissal on moral or ethical gounds and refused to create that precedent.

It is for this Court to now declare whether Judge Hatter correctly applied his constitutional authority to bar this prosecution from proceeding, or whether the Court of Appeals correctly reversed him because no such factual setting has ever before arisen. If "pimping" a prostitute who is also an intravenous drug addict (the two groups of persons at the highest risk of having AIDS!) into the life of a mere suspect is not below the standards that we demand of our government's agents, what behavior would be beyond the pale in our undercover operations? Petitioner believes that this sort of tawdry, immoral and dangerous scheming by zealots within our law

enforcement agencies will not be tolerated by this Court or this nation.

The boundaries of covert, undercover operations by our police agents is a subject of great importance that this Court has not addressed in many years. Congress examined this area, and in 1984 the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary of the House of Representatives (98th Congress, Second Session) issued an "Executive Summary of [the] Report on FBI Undercover Operations" which reveals a great concern for the methodologies being increasingly utilized by the agency. Their review demonstrated that "*many if not all of the potential dangers inherent in undercover operations are being realized.*" Among other findings, the Congressional investigation revealed the following activities and attitudes:

> In principle, the safeguards and [Guidelines on FBI Undercover Operations, effective January 5, 1981] should afford protection against these dangers, and the sincerity and good faith of the top Department of Justice and FBI officials responsible for their promulgation are not in doubt. Yet, the guidelines and safeguards [have] proven to be ineffective because they have 'come to be applied largely ritualistically with acquiescence to whatever is asked for, within broad extremes.'
>
> The approval process in practice is conducted without a critical review of the evidence; with no tolerance for internal dissent; and with little or no sensitivity to the

concerns which prompted the promulgation of the safeguards and guidelines. While the field may be closest to the evidence, the lesson of [Operation] Corkscrew is that that proximity to an investigation may render the investigators and prosecutors blind to its short-comings.

***

The desire to protect the reputation of the Bureau and individual agents also has created a 'stonewalling' attitude, which conflicts with the public's right to assess whether or not the letter and spirit of the safeguards and guidelines are being honored.

***

Evidence of the Bureau's insensitivity, if not hostility, to the purposes of the guidelines is also evident in the process of redefinition, both formal and informal, which has occurred in interpreting the guidelines. These institutional actions have the effect of broadening field discretion at the expense of the rules' requirements.

***

The result of this process of redefinition and word substitution is to avoid compliance with guidelines or other officially promulgated standards in precisely those situations in which they are most needed, e.g., for informants whose credibility or reliability cannot be demonstrated and who therefore would not meet the requirements.

> Because the technique on occasion produces an impressive array of arrests and convictions, it is viewed both by the public and law enforcement community as highly effective. The publicity and prestige accorded successful undercover operations provide powerful incentives for all involved to extend the technique into new areas and to continue to plan and recommend additional operations. These incentives, coupled with the sincere suspicion of the agents that criminal activity is occurring and belief that "they are on the right track," together with the need for vindication, not only compel them to continue the operation, but provide powerful disincentives for supervisors or others to terminate the operation. No one wants to stand in the way of or impede the investigation; no one wants to be characterized as "soft" on law enforcement.
>
> It is precisely because of this enthusiasm for the technique, however, that it is unrealistic to expect the FBI and the Department of Justice to meaningfully regulate the conduct of undercover operations in a manner which will alleviate the dangers outlined in this report and observed by the Subcommittee. (*Summary* at pages 23-25)

The "investigation" of Darrel Simpson was occurring at the same time that this report was being written, and the subcommittee was obviously correct in its concern that this sort of operation might indeed be going on. It should also be noted that in the face of the

instant challenge to their operation the Government did not produce any evidence that they had either sought or obtained any of the approvals called for in the guidelines. It is beyond belief that any of the supervisors in the Department of Justice would have approved of Helen Miller, particularly when, after a month of sleeping with him and being his constant companion, not a shred of evidence had appeared to support the suspicion that Darrel Simpson had anything to do with narcotics trafficking.

Petitioner does not take umbrage with the proposition that faced with the false suspicions voiced by the Canadian authorities, the FBI undertook an investigation of his activites. As the pre-Helen Miller investigation revealed, he had nothing to hide or be concerned about. Even the doubts expressed by Judge Hatter and the Court of Appeals about his past do not shake his faith in both himself and the essential fairness of our system of justice, although it should be noted that "predisposition" plays a minor role in a due process challenge such as put forward herein; if this case were to ever be placed before a jury that concept would obviously be the heart of the entrapment defense proffered.

Due Process was violated in several ways in this proceeding. As stated by the Ninth Circuit in *Greene v. United States* (1971) 454 F.2d 783, "[T]he government may [not] involve itself so directly and continuously over such a long period of time in the creation and maintenance of criminal operations, and yet prosecute its collaborators." Only after an excessive amount of involvement in the life of Mr. Simpson was Ms. Miller able, using the FBI's "front money," to involve him in

her schemes to make some quick money in the drug trade.

The unwarranted invasion of a person's zone of privacy is equally a violation of the Fifth Amendment as it is the Fourth Amendment (*Katz v. United States* (1967) 389 U.S. 347), and in this case the invasion was not only of a person's home, the government actually planted a "bug" in his bed! Both *Griswold v. Connecticut* (1965) 381 U.S. 479, and *Eisenstadt v. Baird* (1972) 405 U.S. 438, firmly established for all time, one would have thought, that the government had no business inside the bedrooms of the American People. Without proper judicial authorization, a more repugnant violation of Justice Brandeis' vision, that "decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen" is beyond the imagination. (*Olmstead v. United States* (1928) 227 U.S. 436)

Finally, though specifically addressed to issues not now before the Court, it must be stressed that Judge Hatter made findings that in their zeal to "get their man" the federal agents in this case, sworn to uphold the Constitution and the laws of the land, presented a federal Judge with an affidavit "artfully drafted with the intent to mislead" him and gain authorization that they were not entitled to, their purpose being to further invade the privacy rights of Mr. Simpson without justification.

This course of conduct by the government is outrageous by definition.

When the bounds of propriety, morality and ethics are so arrogantly exceeded by field agents in a

misguided attempt to "get" someone that they have targeted, all Americans must become concerned indeed.

The bounds of Due Process of Law were egregiously exceeded in this case, and it must become a concern of this Honorable Court.

II

THE DUE PROCESS CLAUSE AS EXCLUSIONARY RULE: AN ANALYTICAL FRAMEWORK

A Defendant's allegations of "Outrageous Governmental Conduct" address violations of Constitutional principles and seek the exclusion of matters from our courtrooms, yet the existing jurisprudence on the subject speaks in terms of a "defense," not an "exclusionary rule." The apparent reason for this is that unlike the typical exclusionary rule, this rule of exclusion does not address individual items of evidence, it excludes the entirety of a case sought to be presented to a court. It transforms the Due Process Clause into an "ultimate" exclusionary rule and "bar(s) the Government from invoking the judicial process to obtain a conviction." (*Russell, supra*, 411 U.S. 423) The instant case presents this Court with an opportunity to provide a framework within which such motions are to be presented and analyzed.

Insofar as the governmental misconduct concept prevents a conviction in a criminal case, it is indeed a "constitutional defense" available to a defendant. Yet it is not a traditional "defense," like entrapment, which is

presented to a finder of fact at trial. These cases are presented through pretrial motions wherein a Court is obligated to apply "principles of due process" to a given set of factual circumstances.

When the Court established the use of an exclusionary rule to enforce the commands of the Fourth Amendment (*Weeks v. United States*, 232 U.S. 383 (1914)) it did so to condemn the illegal practices of government agents, because "To sustain [unlawful governmental activities] would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." The District Court condemned the behavior of the government in this case for precisely the same reasons: "There must be protection of the Constitution and its rights." Egregious constitutional violations by government agents are not to be tolerated, and as a matter "judicial integrity" (*Elkins v. United States* 364 U.S. 206 (1960)), the fruits must be excluded from the Court.

Mapp v. Ohio 367 U.S. 643 (1961) made clear that the rule was also a "deterrent safeguard without insistance upon which the Fourth Amendment would have been reduced to a 'form of words'." Similarly, in making his ruling in this case Judge Hatter intended to send a "message to the government that this kind of activity will not be tolerated."

Justice Brandeis, in his famous dissent in *Olmstead v. United States* (227 U.S. 436 (1928)), argued that the exclusionary rule of the Fourth Amendment should be enforced against government wiretaps because

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the government may commit crimes in order to secure the conviction of a private criminal — would being a terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

This sentiment has, of course, since been accepted by a majority of the Court, and the American People, as a fundamental principle of our law. It is precisely why the case against Messers Simpson, Anderson and Freeman was excluded from the courtroom of the Honorable Terry J. Hatter.

That the Fifth Amendment can be used as the basis of an exclusionary rule is beyond dispute: The Amendment's clause guaranteeing the fundamental right against self-incrimination ("No person . . . shall be compelled in any criminal case to be a witness against himself") has long been held to establish such a rule of exclusion: Any statements obtained by the

government in violation of the guarantee, as well as any "fruits" arising from the initial illegality, are excluded. That the same reasoning should apply to the very next phrase of the same amendment is nothing less than to be expected.

An integral part of this analysis is that the problems of "standing" are obviated. Though some lower courts have stated that, like in Fourth Amendment jurisprudence, only the direct targets of outrageous governmental misconduct have "standing" to object to its fruits, this analysis makes clear that the entire prosecution is infected and excluded from the courts.

Firmly based in established Constitutional precedent, therefore, it is suggested that the Fifth Amendment "defense" of "outrageous government conduct" be considered and analyzed as a rule of exclusion: When allegations of criminal behavior are generated by government agents through behavior found to be violative of the fundamental principles inherent in the due process clause, the resulting prosecution shall, in its entirety, be excluded from the Courts to give meaning to the guarantee and to protect the integrity of the judiciary.

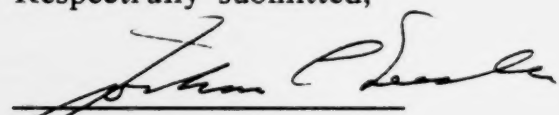
CONCLUSION

This case presents several questions of broad public policy that are ripe for consideration by this Honorable Court. Of particular concern, and in particular need, are directions to law enforcement agents about the parameters of Due Process that cannot and shall not be transgressed in their zealous pursuit of crime and suspected criminals. Even as he comes before this

Court, Darrel Simpson is a presumptively innocent individual, and before the government strips another individual of his inocence, dignity and privacy as they did to him, this Court must give guidance. As a bonus, since this case arises directly from pre-trial motions, the Court has an opportunity to clearly give directions to the lower courts on how to proceed with and analyze the rare case such as is presented by these proceedings.

Our traditional notions of fair play and substantial justice have been trampled by the obnoxious, unwarranted and dangerous activities of the government in this case, and Petitioner urges this Honorable Court to grant the instant Petition for a Writ of Certiorari to review the opinion of the Ninth Circuit Court of Appeals.

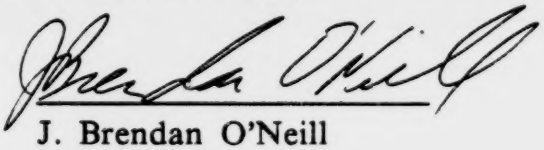
Respectfully submitted,



Joshua C. Needle
Attorney for
Darrel Paterson Simpson

JOINDER IN PETITION

Robert Macriner Anderson, by and through his counsel of record, hereby joins in requesting that the instant Petition filed by Darrel Simpson be accepted and the writ of certiorari be issued.



J. Brendan O'Neill
Attorney for
Robert Macriner Anderson

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

DARREL PATERSON SIMPSON,
ROBERT MACRINER ANDERSON, and
JAMES ROY FREEMAN,
Defendants-Appellees.

No. 84-5301
D.C. No.
CR-84-0145-TJH
OPINION

Argued and Submitted
April 11, 1986—Pasadena, California

Filed April 3, 1987

Before: Procter Hug, Jr., William A. Norris and Cynthia Holcomb Hall, Circuit Judges.

Opinion by Judge Norris

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, District Judge, Presiding

SUMMARY

Criminal Procedure

Appeal from a district court's orders suppressing wiretap evidence and dismissing an indictment on due process grounds. Affirmed in part and reversed in part.

In 1983 the FBI employed Helen Miller as an informant in an investigation of Darrell Simpson (Simpson), who was sus-

pected of being a heroin dealer. Miller was known to the FBI as a prostitute, a heroin user, and a fugitive from Canadian drug charges. Miller and a fellow informant posed as stranded travelers at the Los Angeles Airport, and enticed Simpson into giving them a ride. They ended up at Simpson's apartment where they partied with Simpson and a friend. Miller and Simpson became sexually intimate. Miller introduced Simpson to FBI undercover agents who she said were interested in buying heroin. After a deal was consummated, Simpson and two co-defendants were arrested and indicted on various drug charges. After an evidentiary hearing, the district court dismissed the indictment on the ground that the FBI's conduct in recruiting and using Miller as an informant was so offensive that it violated the due process clause of the Fifth Amendment, in that the conduct, taken as a whole, was outrageous.

He cited (1) the government's manipulation of Miller into becoming an informant, (2) the government's continued employment of Miller despite her known status as a heroin addict and prostitute, and despite her numerous arrests, and (3) the government's continued use of Miller as an informant after learning of her sexual involvement with Simpson. The judge also suppressed evidence obtained from FBI wiretaps of Simpson's home and public telephones he regularly used because the supporting affidavit contained both material misrepresentations and omissions.

[1] Dicta in *United States v. Russell*, 411 U.S. 423 (1973), left the door open to a due process claim when the conduct of law enforcement officers is so grossly shocking and so outrageous as to violate the universal sense of justice. The due process channel which *Russell* kept open is a most narrow one, however. **[2]** The government's conduct in continuing to use Miller as an informant after learning of her sexual involvement with Simpson was not so shocking as to violate the due process clause. **[3]** The outrageous conduct doctrine bars prosecution of defendants in that slim category of cases in

which the police have been brutal, employing physical or psychological coercion against the defendant. [4] Simpson may have suffered severe emotional trauma and felt stripped of his dignity upon learning that Miller's apparent affection for him was contrived, but because Miller's treatment falls short of the brutality and coercion underlying previous successful outrageous conduct challenges, and the government cannot be assigned responsibility for his treatment as easily as it could other cases, a due process violation is not found on these unique facts. [5] The deceptive creation and/or exploitation of an intimate relationship does not exceed the boundary of permissible law enforcement tactics.

[6] Simpson's theory that the use of sex in creating the deceptive relationship rendered his treatment outrageous as a matter of law presents great difficulties. In winning a suspect's confidence, an informant must make overtures of friendship and trust and must enjoy a great deal of freedom in deciding how best to establish a rapport with the suspect, and there is no principled way to identify a fixed point along the continuum from casual physical contact to intense physical bonding beyond which the relationship becomes "shocking" when entertained by an informant. [7] The court declines the invitation of Simpson and amicus curiae to interpret the due process clause as prohibiting the government from using informants who establish emotionally intimate, as distinguished from purely physical, sexual relationships with their suspects. [8] Also, in applying the outrageous conduct doctrine to the facts here, it is concluded that any outrage at Miller's deportment must be tempered by the fact that it is not as readily attributable to the government as the conduct held to violate due process in previous cases. [9] While the FBI's hands were not entirely clean, [10] the government's passive tolerance here of a private informant's questionable conduct is less egregious than the conscious direction of government agents typically present in outrageous conduct challenges.

[11] Even accepting the Judge's conclusion that the FBI manipulated Miller into becoming an informant, this provides no justification for ruling that this raises due process concerns about the investigation of Simpson, and provides no basis for dismissing the indictment on due process grounds. [12] The court found no authority supporting the defendants' claim that the continued use of an informant known to be committing unrelated crimes without the government's urging or approval raises due process concerns. [13] Simpson's contention that the FBI's conduct violated due process as measured by the "government-manufactured crime" test is also rejected. [14] The district court's order dismissing the indictment on due process grounds is reversed.

[15] Given the emphasis on Simpson's insulation from potential informants in the affidavit in support of a wiretap, and the affidavit's portrayal of Miller as an innocent, uninvolved eavesdropper, the court concluded that the omissions created the illusion of necessity for the wiretap. [16] If the full details about Miller's penetration into Simpson's activities were known to the issuing judge, a reasonable district court judge could have denied the application because necessity had not been shown. [17] The order suppressing the wiretap evidence is affirmed.

COUNSEL

J. Brendan O'Neill and Joshua C. Needle, Santa Monica, California; and Donald Etra, Charles Pereyra-Suarez, Joan Howarth, Paul Hoffman, Los Angeles, California, for the appellees.

James D. Henderson and D. Blair Watson, Los Angeles, California, for the appellant.

Luis S. Katz, San Diego, California, Ephraim Margolin, Los Angeles, California, for the amicus.

OPINION

NORRIS, Circuit Judge:

In 1983 the FBI employed Helen Miller as an informant in an investigation of defendant Darrel Simpson, then a suspected heroin dealer. At that time, Miller was known by the FBI to be a prostitute, a heroin user, and a fugitive from Canadian drug charges. Posing as stranded travelers at the Los Angeles International Airport, Miller and a fellow informant, Karen Eccles, enticed Simpson into giving them a ride into town. They ended up at Simpson's apartment where they partied with Simpson and a friend, Tom Marino. Shortly thereafter Miller and Simpson became sexually intimate. In due course Miller introduced Simpson to "friends" who she said were interested in buying heroin. The "friends" were in fact FBI undercover agents. After a deal went down, Simpson and his two co-defendants, Robert Anderson and James Freeman, were arrested and indicted on various drug charges.

After an eight-day evidentiary hearing, the district court dismissed the indictment on the ground that the FBI's conduct in recruiting and using Miller as an informant was so offensive that it violated the due process clause of the Fifth Amendment. In his ruling, Judge Hatter relied upon Chief Justice Rehnquist's oft-quoted dictum in *United States v. Russell*, 411 U.S. 423, 431-32 (1973), that the Supreme Court "may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . ." Judge Hatter found that the following conduct, taken as a whole, was outrageous: first, "the Government's manipulation of Helen Miller into becoming an informant;" second, "the Government's continued employment of Miller despite her known status as a heroin addict and prostitute, and despite

her numerous arrests;" and third, "the Government's continued use of Miller as an informant after learning of her sexual involvement with Darrel Simpson." *Findings of Fact and Conclusions of Law Dismissing the Indictment on Due Process Grounds* ("*Findings*"), at 3. Judge Hatter concluded that the "Government cannot be permitted to stoop to these depths to investigate suspected criminal offenders" and that the government must be "den[ied] the fruits of its heinous acts." *Id.* at 4.

Judge Hatter also suppressed evidence obtained from FBI wiretaps of Simpson's home telephone and several public telephones he regularly used. Judge Hatter found that the affidavit supporting the wiretap application contained both material misrepresentations and omissions and that, when corrected, the affidavit failed to indicate that wiretapping was "necessary" as required by 18 U.S.C. § 2518.

The dismissal of the indictment is a final decision appealable under 28 U.S.C. § 1291.[1] We reverse the order dismissing the indictment, but we affirm the order suppressing the wiretap evidence.

I

THE DUE PROCESS ISSUE

[1] We agree with Judge Hatter that Chief Justice Rehnquist's dictum in *Russell* left the door open to a due process claim when the conduct of law enforcement officers is " 'so grossly shocking and so outrageous as to violate the universal sense of justice.' " *United States v. Ramirez*, 710 F.2d 535,

[1]We reject the defendants' argument that this court lacks jurisdiction because the government's notice of appeal was not timely. The government filed a timely motion for reconsideration which tolls the time period for filing a notice of appeal. 18 U.S.C. § 3731 (1982); *see United States v. Jones*, 608 F.2d 386, 390 (9th Cir. 1979).

539 (9th Cir. 1983) (quoting *United States v. Ryan*, 548 F.2d 782, 789 (9th Cir.), *cert. denied*, 430 U.S. 965 (1977)). *See Moran v. Burbine*, 106 S. Ct. 1135, 1147 (1986) ("We do not question that [in certain circumstances] . . . police deception might rise to a level of a due process violation."). Our circuit has continued to entertain complaints by defendants that their outrageous treatment by law enforcement officers warrants dismissal of their indictment. *See, e.g., United States v. Bogart*, 783 F.2d 1428, 1431-33 (9th Cir.) (discussing history of the doctrine's evolution and application in the Ninth Circuit), *vacated on other grounds with respect to one defendant sub nom. United States v. Wingender*, 790 F.2d 802 (9th Cir. 1986). However, we have acknowledged that "the due process channel which *Russell* kept open is a most narrow one." *Ryan*, 548 F.2d at 789.

Three discrete aspects of the FBI's investigation of Simpson prompted Judge Hatter to conclude that when "taken as a whole" the FBI conduct here violated due process: (1) the FBI's "manipulation" of Miller into becoming an informant; (2) the FBI's continued use of Miller as an informant after learning that she had become sexually involved with Simpson; and (3) the FBI's continued use of her after learning that she was still involved in unrelated criminal activity. After reviewing each of these aspects of the FBI's conduct, we conclude that the conduct was not so outrageous as to justify dismissal of the indictment on due process grounds.[2]

[2]We review the dismissal of an indictment on due process grounds *de novo. United v. Williams*, 791 F.2d 1383, 1386 (9th Cir.), *cert. denied*, 107 S. Ct. 233 (1986). Defendants suggest that "[t]o the extent that Judge Hatter's dismissal was based on the court's inherent supervisory powers, the standard of review is abuse of discretion." *Appellees' Joint Brief*, at 32. If Judge Hatter had invoked the supervisory power to dismiss the indictment, then abuse of discretion would indeed be the applicable standard of review. *See United States v. Sears, Roebuck and Co.*, 719 F.2d 1386, 1395 n.2 (9th Cir. 1983) (Norris, J., dissenting in part), *cert. denied*, 465 U.S. 1079 (1984); *cf. In re Kiefaber*, 774 F.2d 969, 974 (9th Cir. 1985) (exercise of supervisory power to quash grand jury subpoena reviewed for abuse of discretion). However, Judge Hatter did not invoke the court's supervisory power; rather, he explicitly predicated dismissal upon the due process clause. *Findings*, at 1.

A

THE CONTINUED USE OF AN INFORMANT WHO HAS SEX WITH THE SUSPECT

[2] We consider first whether the FBI's continued use of Miller as an informant after learning of her sexual involvement with Simpson raises due process concerns. Judge Hatter found that Miller, acting on instruction by the FBI, pretended to be a close personal friend of Simpson's for a period of over five months. During that time Miller had sex with him on a regular basis.[3] *Findings*, at 2-3. Simpson argues that Miller's use of sex to deceive him into believing she was an intimate friend just so she could lure him into selling heroin to undercover FBI agents constituted an outrageous invasion of his constitutionally protected realms of privacy and autonomy. Although we do not necessarily condone this investigatory tactic, we hold that the government's conduct was not so shocking as to violate the due process clause.

[3] We recognized in *Bogart* that the outrageous conduct doctrine bars prosecution of defendants in "that slim category of cases in which the police have been brutal, employing physical or psychological coercion against the defendant." 783 F.2d at 1435; *see also United States v. Kelly*, 707 F.2d 1460, 1476 n.13 (D.C. Cir) (per curiam) (citing cases), *cert. denied*, 464 U.S. 908 (1983). This case law evolved from the *Russell* Court's citation to *Rochin v. California*, 342 U.S. 165 (1952), as an example of activity which shocks the conscience. 411 U.S. at 432. In *Rochin*, police officers broke into the defendant's bedroom, attempted to pull drug capsules from his throat, and finally forcibly pumped his stomach to

[3]Both Miller and Simpson admit that they engaged in sexual foreplay, but the testimony is in conflict as to whether they also engaged in sexual intercourse. Judge Hatter found it unnecessary to resolve this question in the testimony, and we too find the precise details of their sexual relationship immaterial to our holding.

retrieve the capsules. The Supreme Court found these law enforcement methods "too close to the rack and the screw to permit of constitutional differentiation." 342 U.S. at 172. Relying on *Rochin*, we similarly found that the government's conduct violated due process when border patrol officers forcibly removed narcotics packets from a defendant's rectum while he was handcuffed and held spreadeagled across the table by other officers. *Huguez v. United States*, 406 F.2d 366, 381 (9th Cir. 1968). In contrast to these cases, we have rejected due process challenges to highly intrusive searches for contraband secreted in body cavities and to forced physical treatment to recover swallowed contraband in contexts where these actions were undertaken without "coercion, violence, or brutality to the person." *Irvine v. California*, 347 U.S. 128, 133 (1954) (distinguishing *Rochin*); *see, e.g., Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966) (rejecting outrageous conduct challenge to insertion of tube into defendant's stomach to force him to vomit swallowed drug capsules when pain was limited and procedure was performed by licensed physician); *see also Kelly*, 707 F.2d at 1476 ("The requisite level of outrageousness . . . is not established merely upon a showing of obnoxious behavior or even flagrant misconduct on the part of the police; [due process] is not transgressed absent 'coercion, violence or brutality to the person.' ") (quoting *Irvine*, 347 U.S. at 132-33).

[4] We acknowledge that Simpson may have suffered severe emotional trauma and felt stripped of his dignity upon learning that Miller's apparent affection for him was contrived and designed to hasten his downfall. However, because Simpson's treatment by Miller falls short of the brutality and coercion underlying previous successful outrageous conduct challenges and the government cannot be assigned responsibility for his treatment as easily as it could in these successful challenges, we decline to find a due process violation on these unique facts.

[5] First, the deceptive creation and/or exploitation of an intimate relationship does not exceed the boundary of per-

missible law enforcement tactics. We have recognized that "the government may use artifice and strategem to ferret out criminal activity," *Ramirez*, 710 F.2d at 541, and to that end informants must be permitted to use deceit by "assum[ing] identities that will be convincing to the criminal elements they have to deal with." *United States v. Marcello*, 731 F.2d 1354, 1357 (9th Cir. 1984). The betrayed suspect might feel foolish or insulted but cannot complain of government impropriety based on the use of deception alone. And, Simpson does not claim that he was physically or psychologically coerced into developing a close relationship with her. Indeed, as evidenced by the ease with which Miller befriended Simpson upon his arrival at the airport, Simpson seems to have been quite willing to become sexually and emotionally involved with her. The due process clause does not protect Simpson from voluntarily reposing his trust in one who turns out to be unworthy of it.

[6] Second, we have great difficulty with Simpson's theory that Miller's use of sex in creating the deceptive relationship rendered his treatment outrageous as a matter of law. To win a suspect's confidence, an informant must make overtures of friendship and trust and must enjoy a great deal of freedom in deciding how best to establish a rapport with the suspect. In a particular case the informant might perceive a need to establish a physical as well as emotional bond with the suspect. We see no principled way to identify a fixed point along the continuum from casual physical contact to intense physical bonding beyond which the relationship becomes "shocking" when entertained by an informant. Rather, any attempt to distinguish between holding hands, hugging, kissing, engaging in sexual foreplay, and having sexual intercourse on a regular basis in order to decide when an informant has "gone too far" would require us to draw upon our peculiarly personal notions of human sexuality and social mores. The Supreme Court has rightly indicated that the outrageous conduct doctrine ought not be applied in so subjective a manner, admonishing us not to condemn or condone

government behavior by "draw[ing] on our merely personal and private notions and disregard[ing] the limits that bind judges in their judicial function." *Rochin*, 342 U.S. at 170.

[7] Simpson and *amicus curiae* American Civil Liberties Union suggest that even if Miller's deceptive use of sex is not shocking by itself, her illusory cultivation of emotional intimacy coupled with her sexual charade so magnified the invasion of Simpson's privacy and autonomy interests that prosecution should be barred. *See Separate Brief of Appellee Simpson*, at 6; *Brief of Amicus Curiae, The American Civil Liberties Union*, at 34-37 & n.25. However, we refuse to draw fine lines based on the level of emotional intimacy inhering in a particular informant-suspect relationship. First, we note that law enforcement agents may recruit family members as informants to help investigate their relatives without violating the due process clause. *See, e.g., United States v. Penn*, 647 F.2d 876, 880-84 (9th Cir. 1980) (en banc) (due process does not bar conviction based upon evidence seized when agent offered five-year-old boy five dollars to indicate where boy's mother had hidden cache of heroin). Exploiting an emotionally intimate relationship between lovers seems no more egregious than exploiting an emotionally intimate relationship between family members. Second, courts are not well equipped to assess the degree of intimacy perceived by particular suspects. The proposed focus on intimacy would therefore exacerbate the line-drawing difficulties discussed previously, such that individual judicial determinations that sexual relationships were sufficiently intimate to bar prosecution would lack the "universality" of condemnation required by the due process clause. Accordingly, we decline the invitation to interpret the due process clause as prohibiting the government from using informants who establish emotionally intimate, as distinguished from purely physical, sexual relationships with their suspects.

[8] In applying the outrageous conduct doctrine to the facts of this case, we must focus not only on the acceptability of

Miller's sexual activity but also on the degree of government culpability for Simpson's treatment. We conclude that any outrage at Miller's deportment must be tempered by the fact that it is not as readily attributable to the government as the conduct held to violate due process in previous cases. First, Simpson cannot contend that Miller's status as a paid informant makes her every decision about how to establish rapport with the suspect attributable to the FBI. This argument is squarely foreclosed by *United States v. Prairie*, 572 F.2d 1316 (9th Cir. 1978), in which we held there was no due process violation when, unbeknownst to the government, a paid informant had sex with her suspect. In *Prairie*, the informant was a known prostitute, but she "was neither paid nor asked by the agents to establish any particular relationship with [the suspect] and, in any event, her official role was limited to that of introducing a willing seller of narcotics to a willing purchaser." 572 F.2d at 1319. We held on these facts that there could be no due process violation because the informant's use of sex in dealing with her suspect was not attributable to the government. *Id. See also Ryan*, 548 F.2d at 791 (private informant's interference with a suspect's attorney-client relationship was not attributable to government where there was no "evidence that [the informant] consulted with state agents before [interfering] or that the state was in any manner involved in this [interference]"). As in *Prairie*, the facts as found by Judge Hatter indicate that the FBI did nothing to encourage the informant to use sex in carrying out her assignment. Indeed, Judge Hatter explicitly found that agent Hamer repeatedly "instructed Miller . . . not to get sexually involved." 10 Reporter's Transcript ("R.T.") at 47. Therefore Miller's initial decision to establish a deceptive sexual and emotional relationship cannot be used to characterize the *government's* conduct in this case as outrageous.

[9] To be sure, Judge Hatter found that the FBI's hands were not entirely clean. At some point the FBI became aware of Miller's sexual involvement with Simpson, and though agent Hamer continued to warn her to refrain from further

sexual activity, Judge Hatter found that Hamer probably expected her to continue. 10 R.T. at 47. The FBI deliberately closed its eyes to Miller's ongoing conduct, 10 R.T. at 46, and did not terminate her involvement in the investigation.

[10] Nevertheless, we consider the government's passive tolerance here of a private informant's questionable conduct to be less egregious than the conscious direction of government agents typically present in outrageous conduct challenges. Requiring the FBI to pull out just as an informant's efforts are coming to fruition merely because she engages in sexual activity on her own initiative would seriously undermine the FBI's ability to sustain a carefully planned long-term investigation into secretive criminal enterprises. We hold that on the unique facts before us, taking into account both our reluctance to conclude that Miller's actions were so out of step with universal contemporary sexual norms that they "shocked the conscience" and the FBI's somewhat diminished culpability for Miller's sexual activity, the government's conduct was not so outrageous as to bar prosecution of the defendants.[4]

We recognize that many people in our society may find the deceptive use of sex in law enforcement to be morally offensive. Nonetheless, "in order to apprehend those engaged in serious crime, government agents may lawfully use methods

[4]We need not decide at this time whether the use of sex as a law enforcement tool would "shock the conscience" under circumstances where the government is clearly responsible, as would be the case if Miller had been a law enforcement officer rather than a paid informant. We note, however, that state courts have permitted law enforcement officers to use sex deceitfully to gather information when the suspected crime was prostitution. *See, e.g., State v. Tookes*, 67 Haw. 608, 699 P.2d 983 (1985) (rejecting an outrageous conduct challenge to deceitful use of sex by a civilian volunteer acting at behest of police investigating a prostitution ring); *Anchorage v. Flanagan*, 649 P.2d 957 (Alaska Ct. App. 1982) (same for use of sex by undercover officer); *State v. Putnam*, 31 Wash. App. 156, 639 P.2d 858 (1982) (same for use of sex by civilian authorized by police to turn tricks to gather evidence).

that are neither appealing nor moral if judged by abstract norms of decency," *Bogart*, 783 F.2d at 1438, and therefore the due process clause does not "give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it [does] not approve." *Russell*, 411 U.S. at 435. Rather, our Constitution leaves it to the political branches of government to decide whether to regulate law enforcement conduct which may "offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically," *Rochin*, 342 U.S. at 172, but which is not antithetical to fundamental notions of due process.

B

THE "MANIPULATION" OF MILLER INTO BECOMING AN INFORMANT

Judge Hatter also focused upon "the Government's manipulation of Helen Miller into becoming an informant" in ruling that the government's conduct towards Simpson was so outrageous as to violate due process.[5] *Findings*, at 3. Although he remarked that he was "offended" by the sight of Helen Miller, "a tragic figure," and that "the Government has made her even more tragic" by "plac[ing] her in . . . a set of factual situations that would bring even more stress to bear [on her]," 10 R.T. at 45-46, Judge Hatter made no detailed findings in support of his "manipulation" conclusion. The defendants and the American Civil Liberties Union suggest that Judge Hatter's "manipulation" conclusion was based on evidence that the FBI promised to ease off its investigation into her own narcotics activities in exchange for her help and that the FBI "made her continually dependent on them through their ini-

[5]Judge Hatter made no finding or suggestion that the government manipulated or coerced Miller into having sex with Simpson or that she was paid for doing so. Rather, Judge Hatter focused solely on the means used to recruit Miller as an informant, well before the FBI asked her to participate in its investigation of Simpson.

tial and continued concern and support for her, both monetarily and emotionally." *Brief of Amicus Curiae American Civil Liberties Union*, at 26.

[11] Even accepting the defendants' explanation of Judge Hatter's conclusion,[6] we find no justification for ruling that the FBI's treatment of Miller raises due process concerns about the investigation of Simpson.[7] It is beyond cavil that government agents "may rely on paid informants in order to

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[6]The FBI's conduct with respect to Miller was the subject of conflicting evidence during the pre-trial hearing. Judge Hatter's only explicit finding of fact concerning this issue stated simply that "On December 23, 1982, Helen Miller agreed to become a paid FBI informant." *Findings*, at 1. However, we can infer that Judge Hatter found the facts necessary to support his conclusion that Miller was "manipulated." *See South-Western Publishing v. Simons*, 651 F.2d 653, 656 n.2 (9th Cir. 1981) ("failure to make an express finding of fact by the district court 'does not require remand if a complete understanding of the issues may be had without the aid of separate findings' ") (citation omitted), *cert. denied*, 455 U.S. 1018 (1982).

[7]We reject the government's suggestion that, because the "limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the *defendant*," *Hampton v. United States*, 425 U.S. 484, 490 (1976) (plurality opinion), the defendants here have no standing to complain about the FBI's treatment of an informant. While a "defendant does not have standing to raise a due process violation suffered by a third party," *Bogart*, 783 F.2d at 1433, we have held that because "the target of the government's activity" is a *direct* victim of the government's conduct, the target "has standing to contest his conviction on the grounds that the government's conduct . . . violated *his* due process rights." *Id.* (emphasis added). As the direct target of the FBI's investigation, therefore, Simpson has standing to complain about any outrageous conduct occurring during the investigation. That the informant may also be characterized as a "victim" of the government's conduct in no way undermines Simpson's status as a targeted victim with standing under *Bogart*. *See Ryan*, 548 F.2d at 788-91 (considering defendant's due process challenge to indictment based on the allegedly coercive manner in which government officials recruited a private informant for his investigation).

Since we reach and reject Simpson's challenge on the merits, we need not decide whether defendants Anderson and Freeman, who may not have been direct targets of Miller's activities as an informant, also have standing.

locate and arrest criminals." *United States v. McQuin*, 612 F.2d 1193, 1195-96 (9th Cir.), *cert. denied*, 445 U.S. 955 (1980). Surely Miller was not rendered ineligible to serve as a paid informant because she was poor and because she was vulnerable to becoming emotionally dependent upon her case agents. And, the fact that the agents offered to back off their investigation into Miller's own narcotics activities raises no due process concerns.[8] It is common practice for the government to reduce or drop charges against persons who cooperate with law enforcement officials in the prosecution of others, and we find no constitutionally significant distinction between the use of such a carrot at the prosecution stage and at the investigation stage. *See Ryan*, 548 F.2d at 788-89 (no due process violation when government encouraged one suspect to inform against a friend by threatening suspect with criminal prosecution and warning him that his health would be irreparably damaged by imprisonment). Hence, the government's "manipulation" of Miller into becoming an informant provides no basis for dismissing the indictment on due process grounds.

C

THE CONTINUED USE OF AN INFORMANT WHO ENGAGES IN UNRELATED CRIMINAL ACTIVITY

The third aspect of the FBI's conduct cited by Judge Hatter in dismissing the indictment was "the Government's continued employment of Miller despite her known status as a heroin addict and prostitute, and despite her numerous arrests." *Findings*, at 3. Judge Hatter found that the FBI agents knew Miller was a prostitute and a heroin addict at the time they recruited her and that Miller told the agents during the investigation that she continued to engage in these criminal activities.

[8]As far as the record shows, Miller was perfectly competent to decide whether it was in her own self-interest to serve as an informant in exchange for money and a chance to escape prosecution on drug charges.

[12] We find no authority supporting the defendants' claim that the continued use of an informant known to be committing unrelated crimes without the government's urging or approval raises due process concerns. It is unrealistic to expect law enforcement officers to ferret out criminals without the help of unsavory characters. This court has held that "[g]overnment agents may approach people already engaged in or contemplating criminal activity" to employ them as informants. *Bogart*, 783 F.2d at 1438; *see Ryan*, 548 F.2d 782 (government agents used suspect in bribery scheme as informant to catch co-conspirators). Thus the mere fact that Miller continued to use heroin and engage in prostitution during the investigation of Simpson did not oblige the FBI to stop using her as an informant. Indeed, government agents can go so far as to direct an informant to participate in the very criminal enterprise that is under investigation. *See, e.g., United States v. O'Connor*, 737 F.2d 814, 817-18 (9th Cir. 1984) (use of informant to sell cocaine provided by government was not outrageous), *cert. denied*, 469 U.S. 1218 (1985); *see also United States v. Bowling*, 666 F.2d 1052, 1054-55 (6th Cir. 1981) (informant's participation in nonviolent property crimes held not to be outrageous), *cert. denied*, 455 U.S. 960 (1982); *United States v. Brown*, 635 F.2d 1207, 1213 (6th Cir. 1980) (same).[9]

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[9]We recognize that there are constitutional limits on the type and extent of criminal activity, germane to the investigation or not, in which the government can become involved:

> It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental 'investigation' involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction.

Hampton, 425 U.S. at 493 n.4 (Powell, J., concurring) (quoting *United States v. Archer*, 486 F.2d 670, 676-77 (2d Cir. 1973)). Miller's nonviolent criminal activity that was neither encouraged nor condoned by the government falls far short of this limitation.

D

THE GOVERNMENT'S INVOLVEMENT IN "MANUFACTURING" THE DEFENDANTS' CRIME

[13] Finally, although Judge Hatter did not rely on this argument in dismissing the indictment, Simpson contends on appeal that the FBI's conduct was outrageous because the agents essentially "manufactured" his crime by supplying him with a willing purchaser and by using Miller to persuade him to sell the drugs in the first place. Simpson correctly notes that the outrageous conduct doctrine bars prosecution of defendants when government agents have " 'engineer[ed] and direct[ed] the criminal enterprise from start to finish' " or " 'generat[ed] . . . new crimes merely for the sake of pressing criminal charges against the defendant.' " *Bogart*, 783 F.2d at 1436 (quoting *Ramirez*, 710 F.2d at 539, 540). However, we reject Simpson's contention that the FBI's conduct in this case violated due process as measured by this "government-manufactured crime" test.[10] Judge Hatter's findings contain no suggestion that the FBI created the criminal enterprise. To the contrary, he found that the FBI agents already had a "tremendous amount of knowledge with regard to [Simpson's] activities" when they targeted him for investigation, so much so that "the Government would be remiss if it did not

[10]We know of only two federal cases where prosecution was barred because the government "involve[d] itself so directly and continuously over such a long period of time in the creation and maintenance of criminal operations" as to make prosecution "repugnant to American criminal justice." *Greene v. United States*, 454 F.2d 783, 787 (9th Cir. 1971). In *Greene*, government agents collaborated with a suspected criminal to establish an illegal bootlegging operation and then sustained the operation, acting as both the supplier and sole customer of the illegal operation it had created. In *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), government agents established and supplied a narcotics laboratory in order to arrest a suspect who was at the time "lawfully and peacefully minding his own affairs." *Id.* at 381; *see also Bogart*, 783 F.2d at 1438 (remanding to district court for further findings of fact relevant to the government's alleged role in creating criminal activity).

conduct an intensive investigation of this individual." 10 R.T. at 44 . Rather than creating and directing the criminal enterprise from beginning to end, the FBI simply used an informant to infiltrate a preexisting criminal enterprise. The due process clause does not bar prosecution when an informant's "official role was limited to that of introducing a willing seller of narcotics to a willing purchaser." *Prairie*, 572 F.2d at 1319; *see also Bogart*, 783 F.2d at 1437-38 (courts have consistently rejected outrageous conduct challenges when the targeted criminal enterprise was underway before the government agent became involved).

[14] In conclusion, we hold that the FBI's conduct in recruiting and using Helen Miller as an informant is not "shocking to the universal sense of justice." *Russell*, 411 U.S. at 432 (quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960)). Accordingly, we reverse the district court's order dismissing the indictment on due process grounds.

II

THE WIRETAP ISSUE

Judge Hatter also granted the defendants' motion to suppress evidence obtained from wiretapping Simpson's home phone and several public phones.[11] Following an evidentiary hearing, Judge Hatter found that the affidavit submitted by agent Robert Ross (*"Ross Affidavit"*) to satisfy the statutory

[11]Simpson has standing to move for suppression of the wiretap evidence as an "aggrieved person" under 18 U.S.C. 2518(c)(10)(a) both because he was a party to an intercepted conversation and because a conversation was intercepted on his premises. *See United States v. Jabara*, 618 F.2d 1319, 1326 (9th Cir.), *cert. denied*, 449 U.S. 856 (1980). It is not clear from the record whether Anderson or Freeman were parties to intercepted conversations or enjoyed a privacy interest in the wiretapped premises, but the government does not contest their standing to move for suppression of the wiretap evidence.

requirement that wiretapping be authorized only when necessary[12] was "artfully drafted with the intent to mislead the reviewing judge." *Findings of Fact and Conclusions of Law Suppressing Wiretap Evidence* ("*Wiretap Findings*"), at 5. The affidavit stressed the need for wiretapping to identify all of the members of Simpson's suspected narcotics enterprise. In it Ross claimed that adequate evidence could not be obtained through other investigative avenues because Simpson and his co-conspirators had "insulated themselves and their high echelon accomplices from all but a small circle of associates" such that "[u]ndercover agents, confidential informants, and witnesses cannot penetrate the organization to the highest levels because of insulation tactics utilized." *Ross Affidavit*, at 47. With respect to the FBI's plan to set Simpson up for a drug bust, the affidavit claimed that "there is no reason to believe that such a purchase would identify the source and storage place for the heroin, nor the identities of other conspirators." *Id.* at 50.

[15] Given the affidavit's emphasis on Simpson's insulation from potential informants to justify the need for wiretapping, Judge Hatter found particularly misleading the affidavit's failure to disclose the true depth of Miller's involvement in Simpson's activities. The affidavit "portrayed Helen Miller as an innocent, uninvolved eavesdropper to Darrel Simpson's activities," thus obscuring the fact that she "was deeply involved." *Wiretap Findings*, at 4. Moreover, the affidavit "created the illusion that Source Two and Individual A were different people," when in fact both were Helen Miller, and Ross' failure to so inform the reviewing judge "reflects a conscious effort to mislead." *Id.* Finally, the affidavit failed to

[12]An application for a court-authorized wiretap must include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," 18 U.S.C. § 2518(1)(c), and it must also recite facts indicating that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(3)(c).

report that within two months of meeting Simpson Miller had twice arranged for him to sell heroin to undercover agents and had also introduced him to Agent Hamer. *Id.* at 5. Because of these material misrepresentations and omissions, Judge Hatter found that the affidavit "was not a complete statement as required by Title 18 United States Code, Section 2518(1)(b)(i)" and that "the omissions create the illusion of necessity for the wiretap." *Wiretap Findings,* at 4-5. He concluded that the affidavit, when corrected for the misleading statements and omissions, failed to establish the necessity of wiretapping as required by law. *See generally United States v. Ippolito,* 774 F.2d 1482, 1487 (9th Cir. 1985).[13]

[16] The government argues on appeal that the details of Miller's involvement in the investigation of Simpson were immaterial to the issuing judge's finding of necessity. In other words, the government contends that even when "corrected" for the omissions cited by Judge Hatter, the affidavit still established the "reasonable unlikelihood of a successful *total* penetration of the drug organization under investigation by undercover techniques." *Appellant's Opening Brief,* at 33. After reviewing the affidavit in light of the evidence adduced at the evidentiary hearing and the findings of fact made by Judge Hatter, however, we reject the government's claim of immateriality.[14] The government's assertion that traditional law enforcement methods could not discover the identity of all members of the alleged drug ring assumes that Miller had no potential to win Simpson's confidence enough to learn the

[13]Judge Hatter apparently found that suppression was independently required because the affidavit failed to satisfy other statutory requirements of section 2518. Because we affirm his order based on the government's failure to show necessity, we need not review the other grounds upon which Judge Hatter based his suppression order.

[14]Underlying factual findings of the district court concerning misleading statements and omissions are reviewed under the clearly erroneous standard. *See Ippolito,* 774 F.2d at 1484. The ultimate question whether any misstatements or omissions were material is a mixed question of law and fact and is reviewed *de novo. Id.*

details of the drug enterprise. In fact, however, Judge Hatter found that Miller had become "deeply involved" with the enterprise. *Wiretap Findings*, at 4. Miller had obviously established a close friendship with Simpson, had been present on several occasions while Simpson conducted business with other members of the alleged drug ring, *Ross Affidavit*, at 27-33, and had become trusted enough to be permitted to identify potential drug purchasers for Simpson. In *Ippolito*, we rejected the government's claim that wiretapping was needed to discover the identities of unknown cohorts when in fact an informant "was both willing to testify and had great potential for uncovering the entirety of the conspiracy under investigation." 774 F.2d at 1486-87. Following *Ippolito*, we conclude that if the full details about Miller's penetration into Simpson's activities were known to the issuing judge, "a reasonable district court judge could have denied the application because necessity for the wiretap order had not been shown." *Ippolito*, 774 F.2d at 1487.

[17] To be sure, we have under certain circumstances found wiretapping necessary when traditional investigatory techniques alone could lead to the apprehension and prosecution of only the main conspirators but not the "satellite" conspirators higher up in the drug distribution scheme. *See, e.g., United States v. Brone*, 792 F.2d 1504, 1506 (9th Cir. 1986); *United States v. Sandoval*, 550 F.2d 427, 430 (9th Cir. 1976), *cert. denied*, 434 U.S. 879 (1977). However, we have required the government in each wiretap application to identify *specific* circumstances indicating that traditional techniques cannot reveal the broader picture. As we noted in *Ippolito*, "we must be careful not to permit the government merely to characterize a case as a 'drug conspiracy' . . . that is therefore inherently difficult to investigate. The affidavit must show with specificity why in *this particular investigation* ordinary means of investigation will fail." 774 F.2d at 1486 (emphasis in original) (quoting *United States v. Robinson*, 698 F.2d 448, 453 (D.C. Cir. 1983) (per curiam)). Here, the specific facts withheld from the issuing judge about this particular investi-

gation reveal that traditional techniques could have led to the successful infiltration of the entire enterprise. Accordingly, we affirm Judge Hatter's order suppressing the wiretap evidence.

CONCLUSION

The district court's order suppressing wiretap evidence is affirmed. The order dismissing the indictment on due process grounds is reversed, and the case is remanded for further proceedings consistent with this opinion.

APPENDIX B

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	**No. 84-5301**
Plaintiff/Appellant,	)	
vs.	)	
DARREL PATERSON SIMPSON, ROBERT MACRINER ANDERSON, and JAMES ROY FREEMAN,	)	**ORDER**
Defendants/Appellees.	)	

Before: HUG, NORRIS, and HALL, Circuit Judges

The panel, as constituted above, has unanimously voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for en banc rehearing and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed.R.App. P. 35(b).

The petitions for rehearing are DENIED, and the suggestions for rehearing en banc are REJECTED.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Los Angeles, California 90025; that on August 20, 1987, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing three (3) true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed to the parties as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Original + 40 Copies)

James Henderson
Dept. of Justice
Room 2311, Federal Bldg.
300 No. Los Angeles Street
Los Angeles, CA 90012

Clerk, District Court
United States District Court
For Hon: Terry J. Hatter
312 No. Spring Street
Los Angeles, CA 90012

Joan Howarth, Esq.
ACLU of Southern California
633 South Shatto Place
Los Angeles, Ca 90005
(1 Courtesy Copy)

Ephraim Margolin, Esq.
240 Stockton, Third Floor
San Francisco, CA 94108
(1 Courtesy Copy)

J. Brendan O'Neill, Esq.
1337 Ocean Ave., Suite A
Santa Monica, CA 90401

Donald Etra, Esq.
Sidley & Austin
2049 Century Park East
Suite 3500
Los Angeles, CA 90067

Diane E. Wright, Esq.
Charles Pereyra-Suarez, Esq.
811 W. Seventh Street
Suite 1100
Los Angeles, CA 90017
(1 Courtesy Copy)

Louis S. Katz, Esq.
2437 Second Street
San Diego, CA 92101
(1 Courtesy Copy)

Solicitor General
Department of Justice
Washington, D.C. 20530

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 20, 1987, at Los Angeles, California.

Claude A. Lagardere
(Original signed)